Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	
Promotion of Competitive Networks in Local Telecommunications Markets	WT Docket No. 99-217
Wireless Communications Association International, Inc. Petition for Rulemaking To Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	CC Docket No. 96-98
Review of Section 68.104 and 68.213 of The Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network	CC Docket No. 88-57

JOINT REGULATORY FLEXIBILITY ACT COMMENTS OF THE REAL ACCESS ALLIANCE

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I. INTRODUCTION

On behalf of its members, including a substantial number of small entities for purposes of the Regulatory Flexibility Act, the Real Access Alliance ("Alliance")[1] hereby responds to the Commission's invitation for comments on its Initial Regulatory Flexibility Analysis ("IRFA") set forth in the Appendix to the Further Notice of Proposed Rulemaking ("FNPRM") and Notice of Inquiry in WT Docket No. 99-217 ("IRFA App."). The IRFA is required by the Regulatory Flexibility Act ("RFA").[2] *See* 5 U.S.C. § 603.

Among the proposals at issue in these proceedings are (1) a proposal to require local exchange carriers to deny service to subscribers in buildings whose owners do not comply with Commission policies regarding "nondiscriminatory" access to buildings; (2) a proposal to prohibit or limit the use of exclusive dealing arrangements where such rights are given; and (3) a proposal to expand the rights of competitive local exchange carriers to occupy rights-of-way inside buildings.

In its IRFA, the Commission, pursuant to the requirements of 5 U.S.C. § 603(c), purports to describe any significant alternatives to the proposed rules, as required by 5 U.S.C. § 603(c). The IRFA, however, contains no actual discussion of any such alternatives. The IRFA merely

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[1] The members of the Real Access Alliance are: the Building Owners and Managers Association International ("BOMA"), the Institute of Real Estate Management, the International Council of Shopping Centers, the Manufactured Housing Institute, the National Apartment Association, the National Association of Home Builders, the National Association of Industrial and Office Properties, the National Association of Realtors, the National Association of Real Estate Investment Trusts, the National Multi-Housing Council, and the Real Estate Roundtable.

[2] The RFA definition of "small entity" generally includes "small business" as defined by the SBA. See 5 U.S.C. § 601(6). As a general proposition, SBA defines operators of nonresidential buildings, apartment buildings, and dwellings other than apartment buildings as small businesses if they generate less than $5,000,000 annually. IRFA App.

refers back to a few places in the FNPRM where the Commission noted that it might be appropriate to establish different requirements for different types of buildings -- but there is no presentation of actual "significant alternatives to the proposed rule."

II. THE FAILURE TO INCLUDE AN ANALYSIS OF LESS BURDENSOME ALTERNATIVES VIOLATES THE RFA.

The RFA requires agencies to engage in a two-step process designed to assure that careful consideration be given to the manner in which proposed rules impact small entities economically and the means by which any such impacts can be minimized. Section 603 requires agencies to identify potential economic impacts on small entities, to consider possible ways to minimize those impacts during the formulation of its rulemaking proposal, and to subject its thought process in this respect to public comments. 5 U.S.C. § 603. Section 604 in turn requires the agency to summarize the issues raised by public comments; assess those issues; and state what, if any, changes it has made as a result of those comments. 5 U.S.C. § 604. See also Southern Offshore Fishing Association v. Daley, 995 F.Supp. 1411, 1436 (M.D. Fla. 1998). The obligations imposed by the RFA, moreover, are not merely to consider less severe alternatives, but actually to adopt less severe alternatives where those alternatives will achieve the agency's regulatory goal. North Carolina Fisheries Association, Inc. v. Daley, 27 F.Supp.2d 650, 661 (E.D. Va. 1998).[3] Section 604(a)(5), thus, specifically requires that when it adopts a final rule, an agency must prepare a final regulatory flexibility analysis with:

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[3] The agency's general duty, of course, is "to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." See Farmers Union v. FERC, 734 F. 2d 1486, 1511 (D.C. Cir. 1984), cert. denied 469 U.S. 1034 (1984). "The failure of an agency to consider obvious alternatives has led uniformly to reversal." Yakima Valley Cablevision v. FCC, 794 F. 2d 737, 746 n. 36 (D.C. Cir. 1986); MVMA v. State Farm Ins. Co., 463 U.S. 29, 49 (1983).

> a description of the steps [it] has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected. (Emphasis supplied.)

5 U.S.C. § 604(a)(5).

Section 603(a), moreover, explicitly requires that an agency's IRFA be made "available for public comment." 5 U.S.C. § 603(a). A material required part of any such initial analysis is a description and discussion of proposed alternatives. 5 U.S.C. § 603(c). The Commission's failure to include any such description or discussion in its IRFA here is thus inadequate notice to the public as a matter of law and a material breach of the procedures required by the RFA. Inadequate notice is a fatal defect to the adoption of a final rule. *Cf. Shell Oil Company v. Environmental Protection Agency*, 950 F.2d 741, 750-52 (D.C. Cir. 1990). *See generally Southern Offshore Fishing Association, supra*, 995 F.Supp. at 1436.

The Commission must therefore withdraw its pending FNPRM and reissue it with a revised IRFA that includes the required analysis of less burdensome alternatives to its proposed rules.

III. THE REVISED IRFA SHOULD RECOGNIZE THE INAPPROPRIATENESS OF INDIRECT REGULATION OF BUILDING ACCESS.

Among the factors that the Commission should consider in any discussion of less-costly alternatives pursuant to Section 603(c) is the impact that a forced-access alternative would have on the respective bargaining positions of building owners and operators vis-a-vis

telecommunications carriers.[4] In terms of their relative size and economic muscle, even the smallest CLECs and other telecommunications carriers tend to outweigh the typical building owner or operator. Imposing obligations to deal on the latter, even indirectly, thus stands the goal of the RFA on its head by tilting what may already be a playing field that favors the carriers even more dramatically in their favor.

That the proposed regulation is indirect makes no difference. Property owners will still be at a disadvantage -- perhaps even more of a disadvantage, since the standards and conditions under which service in buildings might be cut off are unclear, and apparently left to the discretion of telecommunications providers.

In any case, forced access is not needed to open local telecommunications markets up to competition. Available data demonstrates that CLECs and other carriers are getting access to rental buildings. *See* Real Access Alliance comments at pp. 3-8.

IV. THE PROPOSALS IN THE NPRM WILL HAVE A SIGNIFICANT EFFECT ON SMALL BUILDING OPERATORS AND THEIR TENANTS.

Our comments on the merits of the Commission's proposals discuss at length the effects those proposals will have on the real estate industry if adopted. We are very concerned about the ability of commercial and residential building owners and managers to manage their properties effectively under these proposals.

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[4] In our comments on the FNPRM itself, the Real Access Alliance demonstrates that the Commission lacks authority to regulate telecommunications access to privately held rental properties through indirect means. To the extent that the Commission, nevertheless, in fact exercises such authority, it then has the obligation under the RFA to assess the economic impact of that exercise on the small entity owners and operators of such properties. Cf. Motor & Equip. Manuf. Assoc. v. Nichols, 142 F.3d 449, 467 (D.C. Cir. 1998), *citing* United Distrib. Cos. v. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

We will not repeat our concerns in detail, but in sum, the proposals will interfere with the ability of landlords to insure compliance with safety codes; provide for the safety of tenants, residents, and visitors; coordinate among tenants and service providers; and manage limited physical space.

These concerns are particularly important in the context of small businesses, which have limited staffs and resources to fulfill those functions. If service providers are granted free access to our members' buildings, small building operators will find themselves unable to keep up with the service providers' activities. They could find themselves exposed to liability for everything from code violations to damage to tenants' property, and never know who was actually responsible for the damage. The additional expense of meeting such claims could threaten the financial viability of many small building owners.

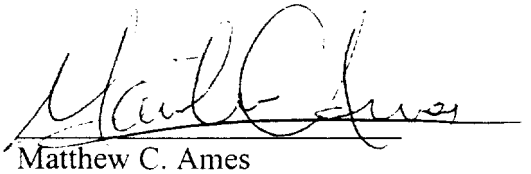
In addition, the proposed sanction of terminating service to tenants in non-compliant buildings would affect innocent tenants, many of whom would be small businesses themselves. The IRFA makes no effort to address this point.

Consequently, should the Commission choose to ignore the requirements of the RFA, as discussed above, and proceed with the current FNPRM, we urge the Commission to find specifically that any final rules will have a significant effect on a substantial number of small businesses and to exempt small businesses from the application of the rules. Although in our principal comments we note that many smaller buildings do not actively manage telecommunications providers on their premises, and further note that many providers are not interested in serving such buildings, many larger buildings that would be affected by the rules are still small businesses.

V. CONCLUSION

The Commission has failed, as required by Section 603 of the RFA, to adequately describe and discuss possible alternative means of addressing its goal of promoting local competition for telecommunications services with less impact on small business entities and to solicit public comment on its analysis of that issue. It has thus, as a matter of law, given the public inadequate notice of its own analysis of this issue and the public has thereby been deprived of the statutorily required opportunity to comment on that analysis. To cure that breach of RFA's notice and comment requirements, the Commission should withdraw this FNPRM and reissue it with a revised IRFA. In doing so, the Commission should recognize that the forced access proposals would strengthen the advantage that telecommunications carriers typically already have in their dealings with building owners and operators, and be counterproductive in terms of their impact on consumer choice. It should further recognize that forced access is not needed in the long-run to promote local competition. At the very least, the Commission must exempt small businesses from any final rules.

Respectfully submitted,



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